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Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 73-18

ARLINGTON HOTEL COMPANY, INC.,
Petitioner,

vs.

JOHNNIE A. REED,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

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To the United States Court of Appeals for the Eighth Circuit

Petitioner prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit in this proceeding, which judgment became final on April 26, 1973.

OPINIONS BELOW

The opinion of Judge Oren Harris dismissing Respondent's individual and class action was not reported. The opinion order denying rehearing of the Circuit Court of Appeals appear in appendix A. hereto. The opinion is presently unreported except in 5 E.P.D. ¶ 8521.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on March 21, 1973. It became final on April 26, 1973, when Petitioner's timely petition for rehearing was denied. This petition for certiorari was filed within ninety days of the latter date. This Court has jurisdiction under 28 U.S.C. § 1254.

QUESTION PRESENTED

Whether class action relief was rendered unnecessary or moot in the captioned litigation by Petitioner's entering into a settlement agreement with the Equal Employment Opportunity Commission.

STATUTES INVOLVED

The federal statutes involved are 42 U.S.C. § 2000e 2(a) and (j) and 42 U.S.C. 2000e 5(j)-(k), being Title VII of the Civil Rights Act of 1964. Said sections of the Civil Rights Act of 1964 are set out in verbatim in appendix B. hereto.

STATEMENT

This is a lawsuit by a black former employee against his former employer alleging discriminatory employment practices under Title VII of the Civil Rights Act of 1964 [42 U.S.C. § 2000e(a)]. The litigation sought relief for the employee individually and for the class he allegedly represented.

Respondent had been discharged along with two other employees for refusing a direct order of their supervisor.

The litigation sought reinstatement for the Respondent and injunctive relief on behalf of the class.

Prior to the institution of the suit, Petitioner offered to enter into a comprehension settlement agreement with the Equal Employment Opportunity Commission ["EEOC"]. Respondent rejected this settlement agreement not based on the fact that it provided inadequate protection against discrimination but simply because it did not provide him with any back pay (Tr. 284-285).

Notwithstanding Respondent's refusal to accept the settlement, Petitioner proceeded to successfully press for a comprehensive settlement agreement with the EEOC. [Defendant's Exh. 2, Tr. 313]. The settlement agreement provided for affirmative actions by Petitioner including seeking out of qualified black applicants and employees for various positions. [See Defendant's Exh. 2, Tr. 313].

After a trial, the District Judge dismissed Respondent's individual claim since he found that the discharge was not racially motivated. (Tr. 316-332). The Judge also dismissed the class action and relied heavily upon the settlement agreement with the EEOC (Tr. 330-332).

Upon appeal to the United States Court of Appeals for the Eighth Circuit affirmed as to Respondent's individual case but reversed and remanded as to the class action. The Court of Appeals rejected the contention that the settlement agreement rendered class action relief unnecessary or moot and ordered further relief, includuing the payment of Respondent's attorney's fees.

Petitioner herein argued on Petition for Rehearing that the Court failed to accord proper weight to the settlement agreement as to the class action. However, the Petition for Rehearing was denied without opinion.

REASONS FOR GRANTING THE WRIT

1. The Circuit Court's disregarding of the EEOC settlement agreement as to the class action renders Title VII's goal of voluntary compliance mere "hollow words." [**42 U.S.C. § 2000e** *et seq.*] Since the charging party did not sign the agreement, it should not have barred his individual relief, but both the District Court and the Court of Appeals found he was entitled to none. However, the agreement to take affirmative action rendered unnecessary and/or moot the class action and injunctive relief.

Title VII's [42 U.S.C. § 2000e *et seq.*] main goal is voluntary action to break down the deplorable walls of segregation, not to do so by the "big stick of injunction" except where absolutely necessary. **McGriff v. A. O. Smith Corporation,** 51 F.R.D. 479 (D.S.C. 1971); **Parham v. Southwestern Bell Tel. Co.,** 433 F.2d 421 (8th Cir. 1970); **Oatis v. Crown-Zellarbach,** 398 F.2d 496 (5th Cir. 1968); **Alexander v. Gardner-Denver Co.,** 346 F.Supp. 1012 (D. Colo. 1971), **aff'd.** 466 F.2d 1209 (10th Cir. 1972), **Cert. granted** U.S. 35 L.Ed. 2d 586, 1973).

If the Circuit Court's decision is allowed to stand, employers will have no incentive to enter into a settlement agreement with the EEOC since voluntary compliance is not rewarded but instead punished by a Federal injunction and the obligation to pay attorney's fees for both sides. This was done in the instant case without any evidence or even discussion of lack of good faith on the part of Petitioner in carrying out its obligation under the settlement agreement.

While it is recognized that the EEOC was not at the time authorized to adjudicate personal claims, it was established to secure voluntary compliance with Title VII

[42 U.S.C. § 2000e *et seq.*]. **McGriff v. A. O. Smith Corporation**, *supra*, **Parham v. Southwestern Bell Tel. Co.**, *supra*, **Oatis v. Crown-Zellarbach**, *supra* and **Alexander v. Gardner-Denver Co.**, *supra*.

There is a conflict between the lower Federal Courts on the effect of settlement agreements upon class actions. **McGriff v. A. O. Smith Corporation**, *supra* and **Reed v. Arlington**, F.2d 5 E.P.D. ¶ 8521 (8th Cir. 1973). If persons involved in the field of fair employment practices are to be able to proceed with any degree of certainty, then this Court should decide this urgent question of Federal law and provide guidance to the lower Federal Courts.

2. Failure to honor the settlement agreement amounts to the same as ignoring an arbitration award. The modern trend and better rule of law is that arbitration is to be favored in the area of employment practices as in other areas of labor relations. **Alexander v. Gardner-Denver Co.**, *supra* and compare **Boy's Markets, Inc. v. Retail Clerks Union, Local 770**, 398 U.S. 235, 26 L.Ed. 2d 199 (1970).

If settlements instead of litigation are to be fostered, then settlement agreements dealing with class type employment practices must be given weight instead of disregarded.

3. Class actions in the field of employment practices are important and necessary. However, they are time consuming on Courts and unnecessary class actions should not be encouraged. Class actions to enforce Title VII (42 U.S.C. § 2000e et seq.) are unnecessary where voluntary compliance has already been achieved. This Court has not yet ruled on the limits of unnecessary class actions in this area and should provide a guiding light for lower Federal Courts on this important question of Federal law.

CONCLUSION

This Court should grant the petition for certiorari and hear the issues raised in this important area of Civil Rights which will determine if the EEOC is a viable agency or merely an impotent group of individuals.

Respectfully submitted

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APPENDIX A

United States Court of Appeals
For the Eighth Circuit

No. 71-1726

Johnnie A. Reed,
Appellant,
v.
Arlington Hotel Company, Inc.,
Appellee.

Appeal from the United States District Court for the Western District of Arkansas.

Submitted: October 16, 1972.

Filed: March 21, 1973.

Before Heaney and Stephenson, Circuit Judges, and Bogue, District Judge.*

Heaney, Circuit Judge.

Johnnie A. Reed, a black, brought this suit on behalf of himself and blacks as a class, contending that the defendant, Arlington Hotel, Inc., of Hot Springs, Arkansas, has violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1), through racially discriminatory employment practices.

* District of South Dakota, sitting by designation.

Reed worked as a bellman at the Arlington Hotel. On February 17, 1969, the chief bellman ordered him and two other black bellmen to help unload a truck. All three refused on the grounds that such a task was not included as part of a bellman's duties. Reed and the others were immediately discharged.

On March 7, 1969, Reed filed a charge with the Equal Employment Opportunity Commission alleging a violation of Title VII. On November 19, 1970, Reed received from the E.E.O.C. notice of his right to sue. On December 18, 1970, he filed this action.

During the course of the trial, the hotel entered into a settlement agreement with the E.E.O.C. Two of those employees discharged in the February, 1969, incident accepted the settlement. Reed rejected it because it included no provision for back pay.

While the defendant's discharge of Reed provided the impetus for the present action, the additional allegations that the hotel has discriminated against all blacks in employment rested upon the hotel's record of maintaining segregated job categories and discriminatory recruitment policies.

After a trial, the court dismissed both Reed's individual action for back pay and injunctive relief and the class action.

I. REED'S ACTION

The trial court held that Reed was fired for insubordination. There is substantial evidence to support that conclusion. When Reed protested the order on the grounds that the unloading was not the work of a bellman, he was told he would be fired if he persisted in his refusal. Moreover, it is clear that the assignment was not a racially discriminatory one. The record rather shows that the unloading was carried out by whomever was available,

whether black or white. Furthermore, there is no evidence to support Reed's contention that he was singled out to do the job because he was black. Employees in all departments did the job from time-to-time, and Reed was in no position to claim special privilege.

II. CLASS ACTION

Before trial, the defendant took the position that the plaintiff, as an employee discharged before the action was commenced, had no standing to raise the issue of discrimination against blacks generally. The defendant relied on two District Court decisions—**Burney v. North American Rockwell Corporation**, 302 F.Supp. 86 (C.D. Cal. 1969), and **Hyatt v. United Aircraft Corp., Sikorsky Aircraft Div.**, 50 F.R.D. 242 (D.Conn. June 11, 1970).[1] The trial court reserved its ruling on the question until after trial, at which time it held that it was proper for the plaintiff to represent blacks as a class. The court stated:

> "• • • [R]ecently the courts [have held] • • • that even an employee who has been discharged, • • • and recognizing that he would not ever go back to work, still has a standing to bring a class action for all those in the same situation • • •. And I think the courts have appropriately pointed out that if this kind of an individual would be prevented from bringing class actions as the rules permit, there would be a windfall for the employer, and when any such matter was coming up, all they would have to do is discharge the employee • • •. That reasoning is logical. So

[1] Accord, **Tolbert v. Daniel Construction Company**, 332 F. Supp. 772, 775 (D.S.C. 1971); **White v. Gates Rubber Company**, 53 F.R.D. 412 (D.Col. 1971). See, **Joslin Dry Goods Co. v. Equal Employ. Opportunity Com'n.**, 336 F.Supp. 941, 948 (D.Col. 1971). But see, **Mack v. General Electric Company**, 329 F.Supp. 72, 75 (E.D. Pa. 1971).

this Court follows the rule that has been more recently established, that a discharged employee does have standing to bring class action where all of the other criteria of the rules have been met. * * *"

The trial court's holding on standing is correct. We have stated that:

"* * * a single charge of employment discrimination under Title VII found by the EEOC to rest upon reasonable grounds may serve to launch a full scale inquiry into the alleged unlawful motivation in employment practices. * * *"

Parham v. Southwestern Bell Telephone Co., 433 F.2d 421, 425 (8th Cir. 1970).

In **Parham**, we allowed an individual who claimed that he had not been hired because of racial discrimination to bring a class action, attacking employment discrimination generally. It requires no extension of **Parham** to give a discharged employee the same privilege. As a black and a former employee, the plaintiff was subject to the same racially discriminatory policies as other members of the class. "The very nature of a Title VII violation rests upon discrimination against a class characteristic, * * *." **Parham v. Southwestern Bell Telephone Co.**, *supra* at 428.

The trial court's holding is also in accord with decisions of those Courts of Appeals which have ruled on the matter. **Tipler v. E. I. duPoint deNemours and Co.**, 443 F.2d 125, 130 (6th Cir. 1971); **Johnson v. Georgia Highway Express, Inc.**, 417 F.2d 1122, 1124 (5th Cir. 1969). See, **Brown v. Gaston County Dyeing Machine Company**, 457 F.2d 1377, 1387, n.8 (4th Cir. 1971) (J. Dupree, concurring), **cert. denied**, 34 L.Ed.2d 246 (1972); **Cf., Graniteville Co. (Sibley Div.) v. Equal Employ. Op. Com'n**, 438 F.2d 32, 35 (4th Cir. 1971).

We next consider, on the merits, the trial court's dismissal of the class action. The court held, in substance,

that while the statistics showed that discrimination had taken place, dismissal was appropriate because the defendant's current hiring practices sufficiently complied with Title VII. We disagree.

The statistics which show segregated departments and job classifications establish a violation of Title VII. Under these circumstances, outright dismissal is inappropriate. See, **Parham v. Southwestern Bell Telephone Co.**, *supra*, at 426.

Thirteen percent of Hot Springs' population was black in 1970. Yet, at the time that suit was filed, five of the hotel's eleven departments, providing approximately fifty-eight jobs, were all white and had traditionally been so. Only two department heads were black. The all-white departments included the higher paying job categories found in the front office, accounting and maintenance departments. One department was all black. Another department had seventeen blacks and three whites. While porters and bellmen performed substantially the same duties, they were divided into two separate departments—each one racially segregated. While turnover in some of these segregated departments was relatively low; in others, it was higher. That some departments were integrated does not change the facts that blacks have been substantially deprived of their Title VII rights.

There was testimony which indicated that even in those departments which were not completely segregated, specific positions were limited to persons of one race. For instance, while the maids in the housekeeping department have usually been black, those persons who work in the linen room have always been white. In the food department, the waiters were all black while the food checkers and cashiers were all white.

In addition, the defendant's recruitment practices at the time suit was brought were racially discriminatory in view

of its history of racial segregation. See, **Brown v. Gaston County Dyeing Machine Company**, *supra*; **Parham v. Southwestern Bell Telephone Co.**, *supra*.

The evidence shows that the hotel had not established uniform recruiting procedures. Sometimes the state employment service was used, but more often recruiting was done by word of mouth. The hotel had also failed to establish objective criteria for evaluating applicants. Recruitment was left to the individual department heads who decided how to publicize a specific job opening and who subjectively determined an applicant's qualifications for employment. Such unstandardized and subjective procedures lend themselves to arbitrary and discriminatory hiring. See, **Brown v. Gaston County Dyeing Machine Company**, *supra* at 1382, 1383.

The evidence also shows that the defendant did not post notices of job openings in the hotel, and news of them was instead passed along by word of mouth. Under the circumstances, this constituted a discriminatory employment practice. A department head may easily discriminate against black employees by failing to notify them of the opportunities for transfer and promotion in the segregated departments. Furthermore, delays in notification may occur which will effectively preclude the black employees from being considered for a job vacancy. See, **Brown v. Gaston County Dyeing Machine Company**, *supra* at 1382, 1383

It has been suggested that dismissal was appropriate because the defendant hired a few blacks in previously all-white positions during the course of the trial or shortly before it. We reject this contention. The number of blacks hired was insubstantial. Recruiting procedures continued to violate Title VII. Further, even if substantial changes had occurred in the hotel's hiring policies, outright dismissal would have been inappropriate because such change

"'in the face of litigation [is] equivocal in purpose, motive and permanence.' **[Jenkins v. United Gas Corporation,** 400 F.2d 28, 33 (5th Cir. 1968)]." **Parham v. Southwestern Bell Telephone Co.,** *supra* at 426.

On appeal, it was also suggested that the settlement agreement between the E.E.O.C. and the defendant has mooted this action even though the plaintiff has rejected it. We also reject this contention. **Cox v. United States Gypsum Company,** 409 F.2d 289, 291 (7th Cir. 1969); **Williams v. New Orleans Steamship Association,** 341 F. Supp. 613, 617 (E.D.La. 1972); **Austin v. Reynolds Metals Company,** 327 F.Supp. 1145, 1151 (E.D.Va. 1970).

> "* * * To hold otherwise would be to make the EEOC the final arbiter of an individual's Title VII grievance whereas Congress has given the federal judiciary the ultimate power to determine Title VII rights. The Commission has not been given the power of adjudication. Hutchings v. United States Industries, Inc., 428 F.2d 303 (5th Cir. 1970); McGriff v. A. O. Smith Corporation, 51 F.R.D. 479 (D.S.C. 1971); **see also,** Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 Harv. L. Rev. 1109, 1249, fn. 301."

Williams v. New Orleans Steamship Association, *supra* at 617-618. Dismissal of the class action on the basis of the settlement agreement would be particularly inappropriate in view of Rule 23 of the Federal Rules of Civil Procedure which provides:

> "'A class action shall not be dismissed or compromized without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.' **See,** Banks v. Lockheed-Georgia Company, 46 F.R.D. 442 (N.D.Ga. 1968). * * *"

Id. at 618.

We can, however, consider the settlement agreement in determining the relief that will be granted. **Cf., Parham v. Southwestern Bell Telephone Co.,** *supra.*

III. REMEDY

In fashioning a remedy, it is our duty to "so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." **Louisiana v. United States,** 380 U.S. 145, 154 (1964), quoted in **Carter v. Gallagher,** 452 F.2d 315, 328 (8th Cir. 1971), **cert. denied,** 406 U.S. 950 (1972). " 'The crux of the problem is how far the employer must go to undo the effects of past discrimination.' " **In the Matter of Bethlehem Steel Corporation, Respondent,** Decision of the Secretary of Labor, C.C.H. Employment Practices Guide § 5128 at 3253 (January 15, 1973).

As we have indicated, the hotel has entered into a settlement agreement with the E.E.O.C. In part, this agreement will govern the hotel's recruitment procedures. The relevant provisions state:

> "4. All hiring, assignment, promotions, transfers, dismissals and other conditions of employment, shall be maintained and conducted in a manner which does not discriminate on the basis of race, color, sex, religion, or national origin in violation of Title VII of the Civil Rights Act of 1964.
>
> • • • • • • • •
>
> "9. The Company agrees to take affirmative action to insure that traditional patterns of recruitment, hiring and job assignment which may have been discriminatory are not perpetuated. Such affirmative action shall include, but not be limited to:
>
> "a) notification in writing of this restatement of policy to all supervisory personnel and all others having hiring or job placement authority.

"b) recruitment efforts shall be conducted so as to insure applicants from minority sources are encouraged to apply. To implement this, Respondent agrees to notify, in writing, all routine sources of recruitment, such as public and private employment agencies. All newspaper advertisements for help wanted are to bear the legend 'AN EQUAL OPPORTUNITY EMPLOYER.'

"10. When using word of mouth recruitment, Respondent agrees that vacancies will be made known to minority employees with a request to publicize such vacancies in their community.

"11. Respondent agrees to recruit for applicants from minority group sources to apply for any vacancies occurring in any currently all-white job categories, such as desk clerk, cashier, telephone operator, porter, parking attendant and office clerical. The selection of the applicant shall be made without discrimination based on race, color, sex, religion or national origin."

This agreement will go a long way to eliminate discrimination in the hiring of new personnel by formally committing the hotel to a policy of equal opportunity, and by providing the means for informing the black community of that policy and of particular job openings. In addition, if the hotel is to fully comply with Title VII, it must adopt written objective criteria for the evaluation of job applicants.

The agreement, however, does not adequately protect the rights of those blacks presently working for the hotel. It is these blacks who have suffered the most from the indignities of segregation and the denial of opportunities for transfer and promotion.

The company has stated that those employed in the porters' department (all white) and the bellman department (all black) perform substantially the same job, and

the separation into two departments is largely based on tradition. Under these circumstances, the hotel must immediately eliminate the distinction between the two departments and permit employees, without regard to race, to perform all the work within either department. Such action will not result in the displacement of any white workers, nor will it significantly interfere with the functioning of the hotel.

The record indicates that the hotel's other departments are organized according to the distinct services they provide. To immediately merge any of the all-white and all-black departments is not appropriate because it would result in totally disrupting the normal functioning of the hotel. We also do not believe that the immediate transfer of some black employees into previously all-white departments is appropriate because this would result in present white employees losing their jobs. Instead, present employees of both races must be given a preference in the filling of job openings as they arise. Notices of such openings must be posted for a reasonable time, and the opening filled by the employee with the longest service with the hotel who is qualified for the position and who desires it.

Finally, the trial court should retain jurisdiction to see that the settlement agreement and this Court's decision are carried out.

The plaintiff is entitled to reasonable attorney's fees, including services for this appeal, to be allowed by the District Court as authorized by 42 U.S.C.A. § 2000e-5(k).

Affirmed in part; reversed in part; and remanded for action consistent with this opinion.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

United States Court of Appeals
For the Eighth Circuit

September Term, 1972

Appeal from the United States District Court
for the Western District of Arkansas

Johnnie A. Reed,
Appellant,
vs.
Arlington Hotel Company, Inc.,
Appellee.
No. 71-1726

The Court having considered petition for rehearing en banc filed by counsel for appellee and, being fully advised in the premises, it is ordered that the petition for rehearing en banc be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is ordered that the petition for rehearing also be, and it is hereby, denied.

April 26, 1973

APPENDIX B

42 U.S.C. § 2000e—1 Public Health and Welfare Ch. 21

42 U.S.C. § 2000e—2. Unlawful employment practices—Employer practices

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

• • • • • • •

Preferential treatment not to be granted on account of existing number or percentage imbalance

(j) Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment

by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

Pub. L. 88-352, Title VII, § 703, July 2, 1964, 78 Stat. 255.

* * * * * * *

42 U.S.C. § 2000e—5 (f) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the plaintiff would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of Title 28, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

* * * * * * *

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include rein-

statement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice). Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex or national origin or in violation of section 2000e—3(a) of this title.

* * * * * * *

(h) The provisions of sections 101 to 115 of Title 29 shall not apply with respect to civil actions brought under this section.

* * * * * * *

(i) In any case in which an employer, employment agency, or labor organization fails to comply with an order of a court issued in a civil action brought under subsection (e) of this section, the Commission may commence proceedings to compel compliance with such order.

* * * * * * *

(j) Any civil action brought under subsection (e) of this section and any proceedings brought under subsection (i) of this section shall be subject to appeal as provided in sections 1291 and 1292, Title 28.

* * * * * * *